IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.1115 OF 2006

Dattatatraya Tatyaba Thorat
Sou Indubai Dattatraya Thorat ...Appellants

vs.

Pushpalata Ramchandra Shinde
Ramchandra D. Shinde ...Respondents

Mr.S.P.Thorat for the Appellants
Mr.V.S.Talkute for Respondent No.2.

CORAM: A.S.OKA,J.
DATE : JULY 5, 2007.

ORAL JUDGMENT:

1. Heard the learned Advocate for the Appellants. First submission of the learned Advocate for the Appellants is that the Appellant Court has not framed proper points for determination and as a result, there are no proper findings recorded by the Appellate Court. He submitted that the Judgment of the Appellate Court is perverse. In view of the said submissions, the following substantial questions of law arise:

i) Whether a prejudice has been caused to the Appellants as a result of failure of the Appellate Court to frame proper points for determination as required by Rule 31 Order XLI of the Code of Civil Procedure,1908 ?

ii) Whether the Judgment of the Appellate Court is perverse ?

2. Considering the controversy involved, I have taken up the Second Appeal for final disposal at the admission stage. Shri

Talkute appearing for the second Respondent states that he will file Vakalatnama for the first Respondent with a period of two weeks from today.

3. The Appellants are the original Plaintiffs who succeeded before the Trial Court and a decree of demolition of disputed wall and a decree of perpetual injunction was passed in their favour. By the impugned Judgment and Decree, the Appeal preferred by the Respondents has been allowed and the decree passed by the Trial Court has been set aside.

4. The Appellate court has framed only one point for determination which reads thus :

. "Whether the trial court while deciding the suit had given proper reasons for answering issues on merits ? : No."

5. In first three paragraphs the learned Judge has referred to the facts of the case. In the fourth paragraph aforesaid point for determination is framed. In paragraph 5 of the Judgment, the Appellate Court has referred to the names of the witnesses who were examined by the parties. Considering the nature of the Judgment of the Appellate Court, I am constrained to reproduce certain observations made by the Appellate Court. In paragraph 6, the Appellate Court has observed thus :

"6...In this case there is a common wall as per the record. Thus, it is seen that if there is common wall in between plaintiff and defendant then it is better to come with clean hands before the court. In this case the one sale deed is filed on record at Exh.158, it is dt. 14.9.1972. Said sale deed shows that the Baburoa Pandurang More had sold some portion out of suit land on 14.9.1972. Another registered sale deed is dt. 16.8.1972 which is filed on record it is executed in favour of Mrs.Pushpalata Shinde by one Shah Gangaram Anandram of Satra it is at Exh.171, it is also regarding suit property. Hence, it is seen from the record that there are 2 sale deeds on record which shows that the said Exh.171 which is dt.16.8.1972 is executed earlier then that of Exh.U which is dt.14.9.1972. Hence,Exh.158 is executed later on than Exh.171. Thus, it is seen that the defendant No.1 had become the owner by above said document. **Thus, above said document on record along with oral evidence shows that the said case is in favour of defendant than that of plaintiff."**

(Emphasis added)

6. In paragraphs 7 and 8 the Appellate Court has referred only to certain Judgments of this Court as well as a Judgment of the Delhi High Court. Only other relevant paragraph of the Judgment is paragraph 9 which reads thus :

"9. Thus, construction of the said encroachment in between disputed portion and dug pit shows that after perusal of each and every documents, the said plaintiff respondent has miserably failed to prove the said issue without proving the same. Hence, said issue is not proved by the respondent/plaintiff. It is seen from the record and I had gone through the prayer of plaintiff and due to the perusal of entire documents and after hearing both the counsel in details the prayer made by the respondent/plaintiff cannot be allowed due to facts on record. Hence, it is better that the finding given by the Ld. Trial Court are to be set aside as they are not properly and legally given, after perusing entire documents on record..."

7. On plain reading of the Judgment of the Appellate Court, it is obvious that the said court has not done its duty as the final fact finding court. If the aforesaid findings recorded by the Appellate Court are considered, no elaborate discussion is necessary to come to the conclusion that entire approach of the Appellate Court is perverse.

8. As the final fact finding court has not done its duty, only course left open for this court is to remand the Appeal to the Appellate Court for deciding the same afresh in accordance with law.

9. Hence, I pass the following order :

i) Impugned Judgment and Decree dated 25th November 2006 is quashed and set aside and Regular Civil Appeal No.310 of 2000 is restored to the file of the District Court. Interim order which was operating in Regular Civil Appeal No.310 of 2000 will continue to operate till the disposal of the Appeal.

ii) Parties are directed to appear before the Principal District Judge, Satara on 13th August 2007 at 11.00 a.m. for fixing the schedule of hearing.

iii) The learned Principal District Judge may hear the Appeal himself or may assign it to some other learned Judge considering his administrative convenience.

iv) The Appeal shall be decided afresh in accordance with law as expeditiously as possible and in any event on or before 31st January 2008.

v) All contentions of the parties are expressly kept open as far as merits of the Appeal are concerned.

vi) The Registrar (Judicial-I) will forward a copy of this Judgment along with a copy of the Judgment of the

Appellate court to the Registrar General for taking appropriate action on the administrative side.

JUDGE